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BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
BOULEVARD EXCAVATING, INC., )  
 )  
Appellant, )  
 )  
v. )  
 )  
PUGET SOUND AIR POLLUTION )  
CONTROL AGENCY, )  
 )  
Respondent. )

PCHB No. 77-69

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a \$250 civil penalty arises from the alleged violation (airborne dust) of Section 9.11 and 9.15 of respondent's Regulation I. Hearing was held before the Pollution Control Hearings Board, Chris Smith and Dave J. Mooney, convened at Seattle, Washington on August 8, 1977. Hearing Examiner William A. Harrison presided. Respondent elected a formal hearing. Appellant Boulevard Excavating, Inc. appeared by and through its attorney, Thomas R. Dreiling. Respondent appeared by and through its attorney, Keith D. McGoffin. Court reporter Juana Tingdale of Olympia recorded the proceedings.

1 RULING ON MOTION TO EXCLUDE EVIDENCE:

2 Appellant, during hearing, objected to the admissibility of certain  
3 testimony and Exhibit R-1, on grounds that the same were irrelevant in  
4 that it was not shown that they pertained to the day of the alleged  
5 violation, April 12, 1977. Ruling was delayed pursuant to WAC 371-08-189  
6 of the Hearings Board Rules of Procedure.

7 Appellant's objection is sustained as to the evidence's relevance to  
8 the issue of whether a violation has occurred, but overruled as to the  
9 issue of the amount of penalty should a violation be found. The  
10 evidence objected to is therefore admitted for the above, limited purpose.

11 Having heard the testimony and considered the exhibits and argument  
12 and being fully advised, the Hearings Board makes the following

13 FINDINGS OF FACT

14 I

15 Respondent, pursuant to RCW 43.21B.260, has filed with this Hearings  
16 Board a certified copy of its Regulation I containing respondent's  
17 regulations and amendments thereto.

18 II

19 Boulevard Excavating Company (appellant) operates a gravel mining  
20 pit in King County. A blacktop county road (known as Jones Road) borders  
21 the pit on the west. Appellant controls two private roads between the  
22 county road and its gravel pit. One is a blacktopped entrance road,  
23 the other a dirt exit road. These private roads and the county road  
24 are used by large gravel trucks as they remove material from appellant's  
25 pit.

26 FINAL FINDINGS OF FACT,  
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III

Mr. and Mrs. Jeff Sauve are citizens whose home is located about 150 feet from the intersection of appellant's dirt exit road and the county road. On April 12, 1977 Mr. Sauve observed airborne dust arising from the dirt exit road as a result of trucks (see Exhibit R-2) leaving the pit. Dust also became airborne as the trucks passed along the blacktopped county road over dirt or gravel which had fallen from the trucks serving appellant's pit, at least some of which were under the control of appellant. The same observation was made by Mrs. Sauve who telephoned the respondent, and reported her observation, at 8:20 a.m.

After the call was relayed, respondent's inspector arrived at the Sauve's home at 9:45 a.m. Over the course of fifteen minutes, while conversing with Mrs. Sauve, respondent's inspector observed six large trucks, under the control of appellant, traveling at apparent fast speeds over the dirt exit road and the county road. He further observed airborne dust, caused by the trucks as they traversed the dirt exit road and the dirt covered county road.

The quantity of airborne dust was sufficient to travel the 150 feet to the Sauve house which it settled into and onto. The dust lay upon furniture and floors inside the home as well as the house exterior, trees and yard. A noticeable layer of the dust also settled onto the inspector's freshly washed car during the fifteen minutes it was parked by the Sauve home.

At 10:00 a.m. respondent's inspector returned to his office and notified appellant of his observations by telephone. Two Notices of Violation and a Notice and Order of Civil Penalty in the total amount of

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1 \$250 were subsequently sent to and received by appellant.

2 IV

3 Airborne dust arising from appellant's dirt exit road and from  
4 material which spills from the trucks to the blacktopped roads has been  
5 entering the home of Mr. and Mrs. Sauve for approximately two years.  
6 Trucks steadily enter and leave appellant's pit. On occasion as many as  
7 fifteen trucks may be waiting to enter, then leave, the pit. During  
8 these two years there has not been any attempt to reduce airborne dust  
9 by water sprinkling and the blacktopped entrance road is washed down  
10 only when the pit is closed and trucks are not operating.

11 Respondent's inspector was aware of truck traffic causing airborne  
12 dust on these same roadways before the episode which occasioned this  
13 appeal. He personally telephoned appellant before April 12th, drew  
14 appellant's attention to the dust, warned that it may be in violation  
15 of respondent's regulations and asked appellant to take voluntary action  
16 to reduce the dust.

17 V

18 Any Conclusion of Law hereinafter recited which should be deemed  
19 to be a Finding of Fact is hereby adopted as such.

20 From these Findings, the Pollution Control Hearings Board comes  
21 to these

22 CONCLUSIONS OF LAW

23 I

24 Official Notice is hereby taken of Subsection 9.15(c) of  
25 respondent's Regulation I violation of which is alleged in the Notice  
26 and Order of Civil Penalty now on appeal. That subsection provides:

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER 4

1           (c) It shall be unlawful for any person to cause or  
2 permit untreated open areas located within a private lot  
3 or roadway to be maintained without taking reasonable  
4 precautions to prevent particulate matter from becoming  
5 airborne.

6           Official notice is also hereby taken of Subsection 9.15(a) of  
7 respondent's Regulation I which was invoked by the evidence presented  
8 at hearing. That subsection provides:

9           (a) It shall be unlawful for any person to cause or  
10 permit particulate matter to be handled, transported or  
11 stored without taking reasonable precautions to prevent  
12 the particulate matter from becoming airborne.

13           Respondent proved a prima facie violation by showing that airborne  
14 dust, from a road under appellant's control and from material which  
15 spilled from trucks under appellant's control onto the county road,  
16 could be seen. From that a legitimate inference can be made that  
17 "reasonable precautions" were not taken. The burden of proceeding or  
18 going forward with the evidence, at that point, is upon appellant to  
19 prove that it had taken "reasonable precautions" to prevent dust from  
20 becoming airborne. Weyerhaeuser Company v. PSAPCA, PCHB No. 1076 (1977)  
21 and Kaiser Aluminum Company v. PSAPCA, PCHB No. 1079 and 1085 (1977).  
22 Appellant failed to carry that burden in this appeal, since it offered no  
23 evidence that it had taken any precautions to prevent airborne dust.

### 24           III

25           Appellant violated Subsection 9.15(c) by failing to take reasonable  
26 precautions to prevent airborne dust from its private exit road.

27           Appellant violated Subsection 9.15(a) by failing to take reasonable

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1 precautions to prevent airborne dust from material on the county road  
2 which fell from its trucks.

3 IV

4 Official notice is hereby taken of Section 9.11 of respondent's  
5 Regulation I, violation of which is alleged in the Notice and Order of  
6 Civil Penalty now on appeal. That section provides, in pertinent part:

7 SECTION 9.11 EMISSION OF AIR CONTAMINANT OR WATER VAPOR:  
8 DETRIMENT TO PERSON OR PROPERTY

9 (a) It shall be unlawful for any person to cause or  
10 permit the emission of an air contaminant or water vapor,  
11 including an air contaminant whose emission is not  
12 otherwise prohibited by this Regulation, if the air  
13 contaminant or water vapor causes detriment to the health,  
14 safety or welfare of any person, or causes damage to  
15 property or business.

16 . . . .

17 V

18 The test for determining whether emissions are detrimental to the  
19 welfare of any person, under Section 9.11, is not expressly stated in  
20 respondent's Regulation 1. Such a test must therefore be inferred with  
21 particular reference to the policy of respondent's Regulation I. That  
22 policy is to "secure and maintain such levels of air quality as will  
23 prevent injury to property . . . (and) foster the comfort and  
24 convenience" of the people. Section 1.01 and RCW 70.94.011. The  
25 antithesis of this policy is "air pollution" which is defined as the  
26 "emission of" an "air contaminant" which "is, or is likely to be,  
27 injurious to . . . property, or which unreasonably interferes with  
28 enjoyment of life and property." Section 1.07(b), (c), and (j) and  
29 RCW 70.94.030(2).

30 The emission of an air contaminant is therefore detrimental to the

1 welfare of a person, and unlawful under Section 9.11, when it  
2 unreasonably interferes with a person's enjoyment of life and property.  
3 Such emissions are inimical to the policy of respondent's Regulation I.

4 VI

5 The airborne dust from appellant's trucks, on April 12, 1977, was  
6 an unreasonable interference with Mr. and Mrs. Sauve's enjoyment of  
7 life and property, and in violation of Section 9.11 of respondent's  
8 Regulation I.

9 VII

10 The \$250 civil penalty imposed by respondent is reasonable in  
11 view of the prior, regular occurrence of episodes such as the one  
12 now before us, and in view of the appellant's failure to curb airborne  
13 dust after respondent's warning and attempt to secure voluntary  
14 compliance.

15 VIII

16 We have examined the other contentions made by appellant and find  
17 them to be without merit.

18 IX

19 Any Finding of Fact which should be deemed a Conclusion of Law is  
20 hereby adopted as such.

21 From these Conclusions, the Pollution Control Hearings Board makes  
22 this

23 ORDER

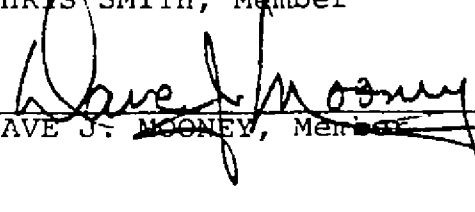
24 The \$250 civil penalty, imposed by respondent's Notice and Order  
25 of Civil Penalty No. 3283, is hereby affirmed.

26 FINAL FINDINGS OF FACT,  
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1 DONE at Lacey, Washington this 13<sup>th</sup> day of October, 1977.

2 POLLUTION CONTROL HEARINGS BOARD

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4 CHRIS SMITH, Member

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6 DAVE J. MOONEY, Member

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